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***Marvin v. Marvin*: The Scope of Equity with Respect to Non-Marital Relationships**

INTRODUCTION

The practice of illicit cohabitation, otherwise referred to as a meretricious relationship, seems to be a practice that is on the rise¹, providing couples with an alternative to the traditional concepts of a marital union². In California, the law had been in a state of flux with conflicting precedents guiding the course of such legally unrecognized relationships³. Recently, the California Supreme Court stepped into the conflict and rendered *Marvin v. Marvin*⁴, a declaration of principles by which the distribution of property acquired in a non-marital relationship should be governed.

1. "The 1970 census figures indicate that today perhaps eight times as many couples are living together without being married as cohabitated ten years ago." See, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226 (1974).

2. CAL. CIV. CODE § 4100 (West 1970) prescribed the definition and requirements for a valid marriage which will be recognized by the State "Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by the issuance of a license and solemnization as authorized by this code" In addition, CAL. CIV. CODE § 4100-4209 (West 1970) explain the requirements and procedures necessary for a valid marriage.

3. *In re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), and *Estate of Atherley*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975), have held that the Family Law Act (Civ. Code, §§ 4000-5000 (West 1970)) requires division of the property according to community property principles, and *Beckman v. Mayhew*, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975) has rejected that holding.

4. 18 C.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977).

Although basic guidelines are set forth, the Court has departed from the traditional meretricious-putative scheme of analysis⁵ and has adopted, instead, a strict contract approach towards the resolution of disputes over ownership of property acquired during illicit cohabitation.

Absent from the Court's analysis is the place or status of such a relationship within the Family Law Act framework. While in the beginning of its opinion the Court dismissed the Family Law Act⁶ as a guide for the distribution of property during a non-marital relationship⁷, the Court in its use of "Contract analysis" basically relied on an equitable treatment of the issue of distribution, although the basis for the use of equity was not delineated. What was more startling was the elaboration by the Court of alternative remedies that could be employed in future situations based upon this "Contract" formula.

In its attempt to do justice, the Court may have created a judicial monster outside the purview of the Family Law Act in which non-marital spouses have greater rights than those of lawfully-wedded couples who have chosen to cohabit under the recognized law. An established judicial and social policy is that of promoting the institution of marriage⁸, a policy that must be presumed still in force in the *Marvin* decision; however, the effect of that decision may have just the opposite effect. . . a new system outside the purview of community property principles in which the effects of cohabitation plus "business" contracts provide the one spouse with more protection than that of a legally-recognized spouse⁹ upon the dissolution of marriage or death of a spouse.

5. *Coats v. Coats*, 160 Cal. 671, 118 P. 441 (1911); *Oakley v. Oakley*, 82 Cal. App. 2d 188, 185 P.2d 848 (1947). If there is no valid legal marriage between the spouses, there is not the requisite "community" for community property purposes. However, case law and CAL. CIV. CODE § 4401 (West 1970) and § 4452 (West Supp. 1977) have provided protection for those spouses who are deemed "putative" spouses—those who believed in good faith that they were validly married but, in fact, were not. However, where both parties had knowledge of the invalidity of their living relationship, the courts did not grant relief unless the party requesting relief had contributed funds to the acquisition of property. *Vallera v. Vallera*, 21 Cal. 2d 681, 685 134 P.2d 761, 763 (1962).

6. CAL. CIV. CODE §§ 4000-5000 (West 1970).

7. A non-marital relationship is hereinafter defined as a relationship between a man and a woman in which both indefinitely take on the assumption of family life without a marriage ceremony and without any of the formalities which the California Civil Code sets forth to define a legally-recognized marriage, but which ostensibly represents a husband and wife relationship.

8. *Deyoe v. Superior Court*, 140 Cal. 476, 482, 74 P. 28, 30 (1903).

9. As will be further illustrated in the paper, a non-married spouse by making contracts that are independent of one another and each resting on

The scope of this note will examine the inadequacies of the *Marvin* decision, in terms of balancing the interests of the man, the woman and the state in this "Contract relationship", to re-examine the social policy attempting to be fostered, and to suggest a more equitable system which would be implemented by using the Family Law Act in conjunction with new social policy guidelines. This scheme would institute a more predictable and just remedial pattern for the distribution of assets acquired during non-marital relationships.

THE STATUS OF THE PROPERTY RIGHTS OF NON-MARRIED COHABITATORS BEFORE MARVIN

The status of unmarried cohabitators' property rights was in a state of confusion prior to the *Marvin* decision¹⁰. The Courts of Appeal had voiced two¹¹ divergent opinions regarding the issue in the cases of *In Re Marriage of Cary*¹² and *Beckman v. Mayhew*¹³.

In *Cary*, the Court recognized the pervasiveness of the no-fault concept of the Family Law Act¹⁴. As stated in the opinion "The equal division of community property was one of the ways of advancing (the Act's) no-fault philosophy."¹⁵ The Court interpreted Civil Code Section 4452 as, in a sense, eliminating the "guilty party" theory of a putative relationship¹⁶. By contending

separate consideration or, on the other hand, making one contract with provisions for relief greater than the relief given in a legally-recognized marital union, the non-married spouse could possibly achieve more benefits than the "legal spouse".

10. See note 3, *supra*.

11. Estate of Atherley, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975) will not be included in this analysis because the case states basically the same principles as *In Re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

12. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

13. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

14. 34 Cal. App. 3d 345, 350, 109 Cal. Rptr. 862, 864 (1973). The Court states that "the basic substantive change in the law (brought about by the Family Law Act) is the elimination of fault or guilt as grounds for granting or denying a divorce and for refusing alimony and making an unequal division of community property."

15. *Id.* at 351, 109 Cal. Rptr. at 865 (1973). In addition, the Court reiterated that the policy behind the Act is so strong that in CAL. CIV. CODE § 4509 (West 1976) the legislature specifically provided that in family law proceedings relating to property rights, any pleading or proof relating to misconduct, or "guilt", or "innocence" of a party "shall be improper and inadmissible."

16. *Id.* at 351-2, 109 Cal. Rptr. at 865 (1973). "An analysis of CAL. CIV. CODE § 4452 (West Supp. 1977) discloses that where one party to a non-marital family

that both parties are "guiltless" a perfect analogy to unmarried co-habitators becomes apparent. The concept of the "guilt" of both parties elucidated in *Keene v. Keene*¹⁷, was abolished in *Cary* if one threshold step was met. The step was that "...not only must an ostensible marital relationship exist, but also an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage."¹⁸ What the Court essentially did was to adopt by analogy Civil Code Section 4452, buttressed by Civil Code Sections 4509¹⁹ and 4800²⁰, with respect to couples living

relationship in bad faith knew of the marriage's infirmity or nonexistence, and the other did not, the Act neither penalizes nor rewards the respective parties upon a judicial division of their accumulated property. The party who in bad faith brought about the pseudo-marriage is not for that reason left where found by the court. Nor may any guilt or innocence of the parties in their relationship after entering the illegitimate union be considered by the court. Sections 4452, 4509 and 4800 assure that the parties, without punishment or reward to either, shall receive an equal division of that which would have been community property had they been validly married."

17. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962) the Court adopted the same type of reasoning as did the Court in *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943) where it stated, "Equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith are not present in such a case." *Id.* at 685, 134 P.2d at 763. Also, in *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 200 P.2d 49 (1948) the Court in trying a case which involved a woman being classified as a putative spouse and gaining relief based upon household services rendered to husband while she was under the belief that her marriage was valid and then at a later time finding out that the marriage had been deemed invalid by reason of a divorce decree, being denied relief on the theory "...that after August 10, 1945, plaintiff was no longer an innocent, deluded, putative wife ... the relationship between the parties was meretricious after October 1, 1945 ... The equitable considerations arising from the reasonable expectation of a continuation of benefits attending the status of marriage entered into in good faith which had existed prior ... did not exist thereafter." *Id.* at 718, 719, 200 P.2d at 55, 56.

These three cases exemplify the strict approach that the Courts took in evaluating whether equitable considerations were to be present. The natural tendency of the Court was to equate meretricious with the word guilt and then to infer a non-equitable circumstance, whereas putative was a word that connoted the good faith of the party.

18. *In re Marriage of Cary*, 34 Cal. App. 3d 345, 353, 109 Cal. Rptr. 862, 865, 866 (1973). It should be pointed out that the criteria for application of the rule (that of equal division of the property—adopted from CAL. CIV. CODE § 4800 (West Supp. 1977)) is much more than that of an unmarried living arrangement between a man and a woman. The concept is that of mutual recognition by the parties that rights, duties, and obligations flow between the parties binding them to a "relationship".

19. CAL. CIV. CODE § 4509 (West Supp. 1977). The section essentially states the policy of the Family Law Act, that of no-fault dissolution. Section 4509 accomplishes this goal by disallowing any evidence of specific acts of misconduct.

20. CAL. CIV. CODE § 4800 (West Supp. 1977). The section governs the distribution of community and quasi-community property and by authority of CAL. CIV. CODE § 4452 (West Supp. 1977) prescribes an equal division of quasi-marital property.

together without the solemnization of the state of marriage. Although the Court did not use the term quasi-marital property²¹ in terms of dividing the property equally, it used the formula of Civil Code Section 4800 in the division, rationalizing that "it is within the equitable jurisdiction of the Court to rule even in the presence of a statutory authority."

Conversely, in *Beckman v. Mayhew*²², a more recent case, the Court shied away from the reasoning of the *Cary* Court stating that the legislature did not ever intend to abrogate the *Vallera-Keene*²³ rule when it adopted the Family Law Act. "Neither", the Court went on to say, "in terms nor by implication does it (the Family Law Act) deal with non-marital family relationships of the kind involved in *Vallera, Keene*, and. . . (*Beckman*)."²⁴

The *Beckman* Court re-adopted the *Vallera* approach stating that the female party gains no interest in property acquired by the man and woman, unless there is an express agreement to pool earnings and share equally in their joint accumulations or, in the absence of such agreement, the woman would be entitled to a share in the property jointly accumulated in the proportion that her funds contributed toward its acquisition.²⁵

It should also be noted that the *Beckman*, *Keene*, and *Cary* Courts did not assimilate the word "funds" with the word "serv-

21. Quasi-marital property is defined in CAL. CIV. CODE § 4452 (West Supp. 1977) as property acquired during the union which would have been community or quasi-community property if the union had not been void or voidable.

22. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

23. The *Vallera-Keene* rule is a four part statement which states that:

- (1) the female partner (or the male partner, whichever is the claiming party) gains no interest in a meretricious relationship; the Court not finding equity in such a circumstance;
- (2) at its termination, the spouse claiming an interest from such a relationship is entitled to share in the accumulated assets only if there has been an express agreement to pool funds;
- (3) in the absence of agreement, for the spouse claiming an interest she must have contributed funds toward the acquisition of the property;
- (4) there shall be no monetary credit for domestic services rendered; in other words, domestic services performed are not funds in the sense of "contribution of funds" to help acquire property.

24. The type of relationship being referred to is a (meretricious) non-marital relationship in which the claiming spouse has not contributed "funds" toward acquisition of property during the relationship; however, in each (non-marital relationship) the female spouse had contributed some type of domestic services to the relationship.

25. See note 24, *supra*.

ices", an essential element in each of the cases. In each, the female partner had contributed domestic services in part or in whole to the "relationship"²⁶. Thus, the unanimity in approach between the two apparently diverse positions focused on one specific area of agreement, the principle that the domestic services of the female partner were not considered contributions for purposes of acquisition of property between a man and a woman.

Also, one should be aware that in the two cases which supposedly set guidelines, the fact patterns triggered different approaches to the concept of so-called meretricious relationships. In *Cary*, the man and woman externally manifested to the world through their conducted business activities²⁷ that they were husband and wife²⁸. They established, according to *Cary*, an "actual family relationship" which consisted of cohabitation and mutual recognition and assumption of the usual rights, duties and obligations attending marriage²⁹.

However, in *Beckman*, the parties did *not* represent openly a "family relationship"; moreover, they made no pretense of a marital status³⁰. Even though their business dealings were mixed, they only used the marital status for their personal benefit and did not assume any of the duties and obligations that flow from the marital union. The equity-laden Court with that set of

26. *Beckman v. Mayhew*, 49 Cal. App. 3d 529, 533, 122 Cal. Rptr. 604, 606 (1975) *Vallera v. Vallera*, 21 Cal. 2d 681, 686, 134 P.2d 761 (1943). Justice Curtis in his dissent intimates that the wife therein had contributed "the value of her services as housekeeper, cook and homemaker" *Keene v. Keene*, 57 Cal. 2d 657, 669, 371 P.2d 329, 336, 21 Cal. Rptr. 593, 600 (1962). Justice Peters states in the *Keene* dissent that during the period from 1938 to 1956, the plaintiff, [the woman] "managed the household and performed all the customary duties of a housewife."

27. The term business activities for purposes herein refers to transactions such as filing of a joint tax return, holding a joint checking account, signing negotiable paper as husband and wife, taking out a loan as husband and wife, etc. In other words, the financial representations of the man and woman outside the home and in non-social settings were that of legally wedded spouses.

28. In addition to holding themselves out as husband and wife in a business transaction, *supra* note 26, the couple represented their status as husband and wife in their social interactions with society.

29. *See* note 18 *supra*.

30. *Beckman v. Mayhew*, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975). In stating the federal backdrop of the case, the Court made note of the fact that if the parties married, their marriage would have caused plaintiff to lose a government pension of \$200.00 to \$230.00 per month. ". . . In social matters the parties made no pretense of marital status. In financial matters, they used their individual last names for some purposes and used the man's last name for other purposes" In other words there was no consistency to their ostensible manifestations with respect to their relationship. *Id.* at 532, 533, 122 Cal. Rptr. at 606, 607.

facts before it, noticeably approached the problem from a different angle.

Thus, the facts of the two cases present an interesting blend of social theories: *Beckman*, placed its emphasis on the promotion of the institution of marriage while *Cary* developed the family relationship test. This latter test focuses upon the manifestation to the world of a husband-and-wife relationship and the former uses upon the solemnization of such a relationship³¹. Although the *Beckman* Court expressly rejected the *Cary* holding, still, the basic social policy of the perpetuation of a husband-wife relationship is evident. The significance of such an observation is important in examining the scope of the social policy from which *Marvin* evolves.

II

MARVIN V. MARVIN

The case involves a non-marital relationship that has terminated. The notoriety and fame of the principals³² adds that much more magnification to an issue of great importance—that is, the method by which the law will govern the distribution of property acquired during a “non-marital relationship”.

Plaintiff and defendant lived together for seven years without entering into a marital union. Both parties knew that no marriage did exist or had ever existed, thus ruling out the theory of putative spouses³³. During this period, all property acquired was taken under defendant's name. Plaintiff, moreover, alleged that both she and defendant entered into an oral contract that stated that they would combine their efforts and earnings and would share equally in all property accumulated as a result of their efforts either individually or combined.

31. *In re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). “The criteria for application of the rule (with respect to unmarried living arrangements between a man and a woman) [is] that there be established not only an ostensible marital relationship but also an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage.” *Id.* at 353, 109 Cal. Rptr. at 867.

32. Lee Marvin, an established star of motion pictures among them, *Cat Ballou*, *Paint Your Wagon*, *The Dirty Dozen*, and numerous others.

33. A putative spouse is defined as one who in good faith honestly believes to have contracted lawfully to marry and continue the relationship.

Further, plaintiff alleged that they did agree to hold themselves out to the general public as husband and wife and that plaintiff would further render services as companion, homemaker, housekeeper and cook to defendant³⁴. Plaintiff also alleged that she agreed to give up a lucrative career as an entertainer (singer) and in return defendant allegedly agreed to provide for all of plaintiff's financial support and needs for the rest of her life. During the period of cohabitation the parties acquired a substantial amount of real and personal property, including motion picture rights.

Thus, the basic issue in the case was to resolve the manner of division of this property acquired during the relationship. Unlike the preceding cases³⁵ which based their reasoning primarily upon joint venture theory and contribution of funds, *Marvin* borrowed contract language from *Vallera v. Vallera*³⁶ and expounded a series of remedies based upon pure contract principles.

In holding that the plaintiff did have an express contract with the defendant concerning their relationship and sustaining a breach thereto, the Court elucidated at the outset of its opinion its conclusions to govern distribution of property acquired in a non-marital relationship. The Court concluded:³⁷

- (1) That the provisions of the Family Law Act do *not* govern the distribution of property acquired during a non-marital relationship; such a relationship remains subject to judicial decision;
- (2) The Courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services;
- (3) In the absence of an express contract, the Courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties; and,
- (4) The Courts may also employ the doctrines of quantum meruit, equitable remedies such as constructive or resulting trusts, when warranted. . .

The Court's opinion, while at a glance seemingly a new approach to the problem of non-marital cohabitation, is really a compilation of reasoning from primarily three sources: first, an adaptation of the contract-type analysis in the majority opinion

34. *Marvin v. Marvin*, 16 Cal. 3d 660, 666, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1977) in the belief that a valid marriage exists.

35. *Keene v. Keene*, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962), *Beckman v. Mayhew*, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

36. 21 Cal. 29 681, 134 P.2d 761 (1943).

37. *Marvin v. Marvin* 18 Cal. 3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1977).

of *Vallera v. Vallera*³⁸, an opinion that had been narrowly construed in cases to follow³⁹ but as readopted in *Marvin*, given a broader construction to include express and implied contracts in their pure sense, non-exclusive of the aspect of contribution of funds;⁴⁰ second, an emphasis on the dissenting opinion by Mr. Justice Curtis expressing his view of inclusion of the contribution of domestic services in the definition of contribution of funds to the community;⁴¹ thirdly, an emphasis on *In Re Marriage of Cary*⁴² in that Court's application of equitable principles of distribution in a non-marital context.

Combined, the *Marvin* Court blends these distinct viewpoints into a not so clear expression of the law with respect to division of property in a non-marital relationship undergoing dissolution.

The opinion, while going a long way to create more equitable treatment of the partners in an illicit cohabitation agreement, has cut off the logical and equitable tie of the Family Law Act. In so doing, the Court has made a dent in a social policy that it has through the years been trying to foster, that of fostering marriage⁴³. Instead of trying to work within the Family Law

38. 21 Cal. 2d 681, 134 P.2d 761 (1943).

39. Although the wording in *Vallera* rings with contract terminology, the concept of application of the principles of express and implied contract were not followed other than in cases where a party had contributed "funds", in the sense of property or money towards acquisition of property.

The rule has been applied in a number of District Court of Appeal decisions since *Vallera* [e.g., *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 719, 200 P.2d 49, 56 (1948); *Baskett v. Crook*, 86 Cal. App. 2d 355, 361-362, 195 P.2d 39, 43 (1943); *Oakley v. Oakley*, 82 Cal. App. 2d 188, 190, 192, 185 P.2d 848, 849-50 (1947)] and has recently been invoked by the highest courts of several sister jurisdictions [e.g., *Stevens v. Anderson* 75 Ariz. 331, 256 P.2d 712, 715 (1953); *Wellmaker v. Roberts*, 213 Ga. 740, 101 S.E.2d 712, 713 (1958); *Sparrow v. Sparrow*, 231 La. 966, 93 So.2d 232, 234 (1957); *Smith v. Smith*, 255 Wis. 96, 38 N.W.2d 12, 14 (1949)].

It may be pointed out that in denying relief in cases of this nature the courts have not discriminated against the woman, but have also rejected where appropriate, the claim of the man. [See, e.g., *Gjurich v. Fieg*, 164 Cal. 429, 129 P. 464 (1918); *McQuin v. Rice*, 88 Cal. App. 2d 914, 199 P.2d 742 (1948); *Orth v. Wood*, 354 Pa. 121, 47 A.2d 140 (1946); *Wosche v. Kraming*, 353 Pa. 481, 46 A.2d 220 (1946)].

40. In *Marvin*, the Court allowed the law of contract, i.e., methods of proof, terms, conditions, etc. to pervade the context of non-marital living relationships, not limited by the previous strict caveat of mandatory contribution of "funds" to the acquisition of property during the period of the relationship.

41. In *Vallera v. Vallera*, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943) Mr. Justice Curtis in his dissent equated contribution of domestic services by a party as inclusive in the definition of "contributions of funds" to the community.

42. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

43. See note 8, *supra*.

Act, as provided by the Legislature, the Court has classified non-marital relationships as ones outside the purview of the Act, and has given them remedies based upon contract theory. These remedies could possibly arrive at the same equitable result as would have been achieved using the Family Law Act as a guide. However, the additional possibility exists that by carefully constructing a complaint, one of the parties to the "relationship" could be awarded a non-equal share in the property distribution.⁴⁴

In reviewing the decision, two points stand out to this author as problem areas. First, the excising from consideration the policy of the Family Law Act in dealing with non-marital relationships. Second, the statement of remedies enunciated by the Court: whether they will adequately cover situations or whether they will provide one spouse in a non-marital relationship with an advantage over that of a legally-wedded spouse in a similar position.

The institution of matrimony is said to be the foundation of society, and a community at large has an interest in the maintenance of its integrity and purity. In every civilized country, marriage is recognized as the most important relation in life and one in which the state is vitally interested. The public policy is to foster and to protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation⁴⁵.

It must be assumed then, that this public policy still pervades the law of this state. However, it is appropriate to ask, in light of *Marvin*, whether that public policy is one that is outdated or one that is in need of redefinition.

The Family Law Act's primary purpose is for the division of property acquired by the parties under a marital relationship. The Act embodies the basic theory for division of property, that of community property⁴⁶. From this theory which has survived from its adoption in the Treaty of 1848⁴⁷, the new act has elimi-

44. For example, a spouse could allege that an oral contract existed whereby the parties would each split one-half of the property acquired by each and that the working spouse, in addition, would pay to the non-working spouse a yearly salary for domestic services rendered.

45. See note 8, *supra*.

46. CAL. CIV. CODE § 4800 (West Supp. 1977).

47. Following the admission, in 1845, of the independent Republic of Texas as a state in our federal union, the United States assumed the burden of the boundary disputes existing between Texas and Mexico. At the outbreak of the war in 1846, the U.S. immediately put under way plans for the conquest of California. After seizure of the region by the U.S., the Treaty of Guadalupe

nated the concept of fault or guilt as grounds for granting or denying a divorce, for refusing alimony or making unequal division of community property⁴⁸.

Cary, in using the Family Law Act as a guidepost, specifically Civil Code Section 4452, brought community property principles into effect when an actual family relationship was found⁴⁹. Thus, by analogizing to the Family Law Act the two parties living together were, in effect, being governed by community property principles, which imposed upon them the rights and duties peculiar to married persons⁵⁰.

Thus, *Cary* took advantage of the statutory remedies as written and made them governing law with respect to those persons not adhering to the legal concept of marriage. The wisdom of such an approach was twofold. First, in applying equitable principles to the dissolution of a non-marital relationship, the Court provided equitable relief while at the same time predicated relief upon the desirable social policy of promoting the family unit. The jurisdiction of the Court is not diminished when by statutory change some rights cease to exist, and certain cases which Courts of Equity once entertained can no longer arise. The equity power of the courts was not intended as a limitation

Hidalgo in 1848 confirmed this possession. Under the treaty, civil authority was in the hands of the military which adopted the "laws of California" not inconsistent with the laws, constitution, and treaties of the United States. It is clear that the former existing law, which included the community property system, was recognized and continued by the proper governmental authority during this period between conquest of California and the taking effect of its constitution and admission as a state. Further, in the Constitution of California written in 1849, Art. XI § 14 shows conclusively that it was the intention of its authors to adopt the Spanish system of community property. W. DE. FUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY*, 106-109 (1st ed. 1943).

48. CAL. CIV. CODE § 4509 (West Supp. 1977).

49. See note 18, *supra*.

50. These rights and duties imposed upon the parties in a nonmarital relationship are only meant to connote rights and duties with respect to the governing of distribution of property. In Miller, *The Return of Common Law Marriage to California*, Vol. 8, No. 2 J. BEVERLY HILLS BAR ASSOCIATION 19 (1974), the author states that if the *Cary* ruling is followed "once an actual family relationship is established, all of the provisions of the Family Law Act applicable to such a relationship could well apply, including, for example, orders for spousal support and the like" It should be noted that by no means does this article represent the same type of far-reaching analogistic approach as presented in the Journal quotation, *supra*. The context and the extent of the analysis is limited to property division and establishing equitable guidelines thereto.

upon the power to legislate upon the rights of persons⁵¹. Second, the Court left itself with code sections and case law from which to analogize when faced with more complex problems⁵² regarding dissolutions of non-marital relationships. Therefore, while the legislature did *not* expressly provide its policy on the issue of non-marital division of property acquired during the relationship, the Court, sitting in its equitable capacity can infer and adopt equitable principles from the Act and integrate them into case-made law based upon equitable considerations.

Marvin took non-marital relationships out of the Family Law Act background and placed over them a veil of contract law.⁵³

It is a well-settled principle reiterated in the *Marvin* decision that non-marital partners may lawfully contract concerning the ownership of the property acquired during the relationship⁵⁴. So too, married persons can contract with respect to the property acquired during the marriage or with respect to their individual, separate property⁵⁵. However, in the cases that the *Marvin* Court cites, the property contracts either express or implied-in-fact were distinct and applied to specific pieces of property⁵⁶. Conversely, what is proposed in the decision is express and implied-in fact contracts affecting *all* the property acquired during the relationship. Thus, the focus shifts considerably in the "contract analysis" from whether the contract

51. *Modern Barber College v. California Employment Stabilization Commission*, 31 Cal. 2d 720, 192 P.2d 916 (1948). The case presented the problem of whether a writ of mandamus, an equitable remedy, could be issued in the face of a statutory remedy expressly governing the situation. The Court in holding in the negative did, however, in its dicta, consider the situation where the Legislature has spoken but has not covered the issue in question specifically. Such is the situation here, where a Court has the power under its equitable jurisdiction to provide a remedy for the specific cause at issue before it.

A similar sentiment existed in *Estate of Barnett*, 97 Cal. App. 138, 275 P. 453 (1928). In addition, where the subject is of judicial origin, and there is no statute which purports to cover the subject comprehensively and definitely, the subject area is more susceptible to change by judicial action. 1 C. DALLAS SANDS, STATUTES AND STATUTORY CONSTRUCTION 59-62 (4th ed. 1972). [Note: there is no Section in the California Civil Code that deals with the issue of property division in a non-marital relationship.]

52. The reference to "more complex problems" does not intimate any problems beyond the scope of property division between the parties.

53. *Marvin v. Marvin*, 18 Cal.3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1977). The case expressly states that "the provisions of the Family Law Act do not govern the distribution of property acquired during a non-marital relationship." This strong wording infers that the entire act together with its policy are to be cast away when dealing with non-marital relationships.

54. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977).

55. CAL. CIV. CODE §§ 4802 and 5107-8 (West 1970).

56. *Trutalli v. Meraviglia*, 215 Cal. 698, 12 P.2d 430 (1932), and *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943).

is to be interpreted in the narrow sense as affecting particular pieces of property to whether the contract is to be one affecting the bounds of a relationship. Clearly, the Court in *Marvin v. Marvin*⁵⁷ advocates the imposition of contract law to effect the latter. In taking such an approach without defining precisely the social policy and the bounds of equity involved, the Court has exposed itself to numerous possible attacks and situations which will inevitably increase the congestion of the courts, and its impact strikes at the law both with respect to non-marital relationships as well as to marriages consummated under the authority of the State⁵⁸.

III

PROMOTING AND FOSTERING OSTENSIBLE RELATIONSHIPS VERSUS PROMOTING AND FOSTERING THE INSTITUTION OF MARRIAGE:

A New Social Policy

In focusing upon the remedies proposed in *Marvin v. Marvin*⁵⁹ and their general applicability to non-marital relationships, it is important to discover the social policy being fostered so that the remedies proposed can be applied by the courts in a consistent and equitable manner.

However, *Marvin's* basic problem is that it does not delineate any social policy grounds for its ruling⁶⁰ and by precluding application of the Family Law Act has discarded its scope of equity in which to function⁶¹.

For relief to be granted to a petitioning non-married partner, must there be a solemnized marriage as fostered in *Beckman v.*

57. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1970).

58. CAL. CIV. CODE §§ 4100-4104 (West 1970) state the requirements for a valid marriage in the State of California.

59. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977).

60. *Id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. Even though the Court recognized the social policy of fostering and promoting the institution of valid marriages, the Court stated that equitable considerations are paramount, but did not delineate what the status of the above-mentioned policy is.

61. *Id.* at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829. The Court makes the assertion that there is no reason to believe the legislature intended the Family Law Act to effect the relationship between non-marital partners; however, by such an assertion, the Court also rules out the possibility of analogizing to the "Act" to define more precisely the scope of the equitable remedies.

*Mayhew*⁶², or an "actual family relationship" consisting of the spouses appearing to be husband and wife as advocated in *Cary*.⁶³ Or is it necessary to formulate a new social policy emphasizing the family as made up of two individuals, a man and a woman, who do not necessarily "label themselves" to the world as husband and wife per se, but do contribute to a "community of interest"⁶⁴ accepting the rights and duties of a family?

The *Marvin* Court struggles with and rejects the *Beckman*-type approach when it states that although it recognizes the public policy to foster the institution of marriage⁶⁵, at the same time it could not tolerate judicial rules which result in an inequitable division of property.

In *Cary*, the Appellate Court predicated relief upon meeting the family relationship test⁶⁶. However, one must ponder what really is the test in *Cary*. Is the test of this ostensible family relationship the representation of the parties as husband and wife to the community at large in the form of their business and social contexts? Such a limited view of the test could be supported by the facts in the *Cary* case itself⁶⁷ and by the already existing social policy of fostering the institution of marriage. Because the *Cary* Court did not address itself to the issue of the prevailing social policy, it can be arguably presumed that the Court incorporated the existing social policy of promoting and fostering the institution of marriage and extended the concept to non-marital relationships when the parties hold themselves out as husband and wife.

Still, *Marvin's* remedies do not seem so constrained and limited⁶⁸.

A third alternative that no Court has yet espoused, but within which the *Marvin* decision could function is a new social

62. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

63. See note 31, *supra*.

64. As used in this paper, the term "community of interest" refers to the acts by which the parties in a non-marital relationship contribute to the survival of the relationship, whether it be in terms of money, services, etc., in the attempt to preserve the relationship and which are not solely based on sexual consideration.

65. See note 60, *supra*.

66. See note 31, *supra*.

67. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). The facts of the case were basically that the two parties held themselves out as husband and wife in their business transactions and social functions. This is in direct contrast to a relationship where the parties live together contributing to the continuation of the relationship but at the same time retain their identity as individuals (not as partners) in their outward manifestations to the outside world.

68. See note 60, *supra*.

policy emphasizing a family relationship not constrained by an ostensible labels as in *Cary*, but viewed in a context of an overt intent to contribute in some way to a "community of interest" in a non-marital relationship. Anything less than an intentional and overt attempt to keep all the property separate would result in the court acknowledging this as a family relationship and thus imposing upon the parties the rights and duties imposed upon married individuals subject to the Family Law Act.

Such a view would:

1—promote the concept of establishing family relationships because the parties would know that the effect of living together in a non-marital union would not be different from living together under the solemnization of the State⁶⁹;

2—provide for a more equitable scope of division of the property since neither party could effectively take advantage of the other; and,

3—provide the court with a defined scope with respect to granting relief under express as well as implied contracts and see to the fact that non-marital relationships are not placed in a more favored position than marital relationships with respect to the division of property.

The Remedies Of Express And Implied Contract

The ramifications of an express contract as in the *Marvin* case, whose terms consisted of clauses regarding division of property acquired during the relationship and a provision granting the non-working spouse support "for the rest of her life,"⁷⁰ provide the easiest of situations in which to apply the

69. The indirect result of such an imposition of rights and duties is to begin a relationship with the given fact that obligations will arise with respect to a communal living arrangement.

70. This wording when taken in the context of a marital union would presumptively mean that the working spouse would provide for the monetary support of the nonworking spouse during the marriage. In the event of dissolution, the Court under CAL. CIV. CODE §§ 4351 and 4801 (West Supp. 1977) would have the power "to order a party to pay for the support of the other party . . . for such period of time, as the Court may deem just and reasonable having regard for the circumstances of the respective parties, including the duration of the marriage, and the ability of the supported spouse to engage in gainful employment without interfering with the interests of the children of the parties in the custody of such spouse" CAL. CIV. CODE § 4801 (West Supp. 1977).

Marvin remedies⁷¹.

That “non-marital partners may lawfully contract concerning the ownership of property acquired during the relationship”⁷² cannot be quarreled with on contract grounds. The Court further substantiates that a contract between non-marital partners, even if expressly made in contemplation of a common living arrangement, is invalid only if sexual services form an inseparable part of the consideration for the agreement⁷³.

In the present case, the defendant admitted entering into the contract, thereby leaving himself open to the express contract analysis and remedial provisions for breach⁷⁴.

Ponder, however, the situation where the other spouse denies that a contract did exist, or alternatively that a contract did exist but that the parties specifically agreed *not* to be bound by any legal obligations during the relationship to each other and, in the event of dissolution, that each person’s property would remain separate.

Thus, we must proceed to the *Marvin* Court’s second suggestion that in the absence of an express contract, the Court should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement or partnership or joint venture⁷⁵.

Two basic constructions can result from the wording allegedly made in the contract. One, that the terms of support are similar to a husband and wife relationship and are governed by the CAL. CIV. CODE §§ 4800 and 4801 (West 1976) by analogy. Second, if pure contract theory is employed the phrase “support for the rest of her life” might mean just that. Since there is no valid relationship existing, as the parties so acknowledged, the argument could be made that since no formal end could come about, the phrase constituted a clause in the contract that stood with other clauses. The argument could be made that it is unreasonable and beyond the expectations of the parties that such a clause would be made; however, putting yourself in the position of the non-working spouse, giving up a potential career in the entertainment industry, it could be reasonably intended that whether or not the relationship continued support would still be due and owing. The rationale for such a provision would be a security clause for the nonworking spouse.

71. This being so because there appears to be an agreement existing that covers the basis of a property division.

72. *Trutalli v. Meraviglia*, 215 Cal. 698, 12 P.2d 430 (1932). Numerous other cases have upheld enforcement of agreements between non-marital partners in factual settings similar to the *Marvin* agreements. See, *In Re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974); *Weak v. Weak*, 202 Cal. App. 2d 632, 21 Cal. Rptr. 9 (1962); *Padilla v. Padilla*, 38 Cal. App. 2d 319, 100 P.2d 1093 (1940).

73. *Hill v. Estate of Westbrook*, 95 Cal. App. 2d 599, 213 P.2d 727 (1950), *Updeck v. Samuel*, 123 Cal. App. 2d 264, 266 P.2d 822 (1954).

74. In this case “damages” resulting therefrom are covered by the provisions for ownership of property and support in the contract.

75. *Marvin v. Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1977).

As Corbin states:⁷⁶

[a]greement. . .mean(s) the expression of two or more persons respecting a subject matter of a kind that in the past has stimulated official action of the part of organized society. . .an agreement consists of mutual expressions; it does *not* consist of harmonious intentions or state of mind. It may well be that intentions and states of mind are themselves nothing but chemical reactions or electrical discharges in some part of the nervous system. It may be that some day we may be able to observe a state of mind in the same way that we observe chemical processes and electrical discharges. At present, however, what we observe for judicial purpose is the conduct of the parties. We observe this conduct and we describe it as the expression of a state of mind. It is by the conduct of two parties, by their bodily manifestations, that we must determine the existence of what is called agreement. . . . This is what is meant by mutual assent.

Thus, the Court is faced with the task of observing the parties and ascertaining whether such a contract concerning the rights of the two non-marital partners exists. However, what standard will the courts use to ascertain such responsibilities between the parties? The fact that cohabitation exists between the parties cannot be such a basis. The principle was elucidated in *Marvin* when the Court stated that "agreements between non-marital partners fail. . .to the extent that they rest upon meretricious sexual services⁷⁷". Therefore, more must be shown. How, then, does the Court decide? What type of relationship must seem to exist before relief can be granted?

It is obvious that such a standard must comply with a social policy that defines the limit to which such an implied-in-fact contract could arise.

Marvin implies that such a contract will result in equitable distribution of the property and also that the holding in *Vallera* imputing a non-equitable position to the relationship was erroneous⁷⁸.

Therefore, we return to the definition of the scope of equity that will establish such an implied-in-fact contract for distribution of the property acquired during the relationship. Noting that *Marvin's* basic theory is in favor of equitable division, the logical step is again missing as a result of dismissing the Family

76. 1 A. CORBIN, CORBIN ON CONTRACTS § 9, at 20 (1963).

77. See note 73, *supra*.

78. *Marvin v. Marvin*, 18 Cal. 3d 660, 676, 557 P.2d 106, 134 Cal. Rptr. 815, 826 (1977).

Law Act. If the Court adopts the narrow view with respect to contracts for particular pieces of property, one spouse might necessarily be denied a truly equitable division. On the other hand, if a broad construction is adopted, providing those couples who have demonstrated an intent to contribute to the preservation of the relationship with the rights and duties of those married couples under the Family Law Act, a truly equitable split of the property would be accomplished.

Inasmuch as the *Marvin* Court views the parties as “not guilty” they may appeal to equity for equal treatment under the law. Thus, when a non-married party accustomed to support throughout the “relationship” moves for alimony as part of the property division, should not the court grant such based on the implied contract? Note that leaving the parties at the status quo is not accomplished by just an equal division of the property. It can easily be proved and stated that a spouse who has given up a full time or part time working career has given up the potential for individual development in terms of working skills as a part of the “consideration package”⁷⁹.

Imposed upon this consideration is the issue that if a court *does* allow such support and division, is a party holding an express contract that did not contemplate a broader range of remedial devices precluded from extending his division of property, thus putting the persons with no express agreement in the more favorable position?

*The Use of the Remedy of Quantum Meruit
In The Equitable Division of Property
In Non-Marital Relationships*

In addition to its remedies of express and implied contract, the Court in *Marvin v. Marvin*⁸⁰ suggests the use of the doctrine of quantum meruit as a remedial device “when warranted by the facts of the case”⁸¹.

79. RESTATEMENT (SECOND) OF CONTRACTS § 75 (1973)

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification, or destruction of a legal relation.
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

80. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977).

81. *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

The basic theory of the remedy is restitution, the purpose of which is the restoration of the "injured party"⁸² to the same position as was occupied by him before the contract was made, without attempting to compensate him for consequential harms. The means to this end is a judgment for the equivalent in money of any performance rendered by the plaintiff and received by the defendant.⁸³

The principle is that one who has rendered services under a contract with another, but who has been "wrongly"⁸⁴ discharged or otherwise prevented from fully performing its terms and conditions as to earn the agreed compensation, may regard the contract as terminated and get judgment for the reasonable value of all that the defendant has received in performance of the contract.⁸⁵

The question then presented is how the remedy should be used. Should it be a substitute for support as was previously one of its functions or should it be used in conjunction with the other theories of distribution espoused by the *Marvin* Court—express and implied contract.

The scope of application of the remedy will, to a large extent, create a balance between marital and non-marital relationships or create situations in which the non-marital relationship could gain an advantage over that of the married relationship.

In prior case law⁸⁶ the doctrine of quantum meruit was used effectively as a substitute for support rights for the putative spouse. The Court in *Lazzarevich v. Lazzarevich*⁸⁷, established the rule that a putative spouse could recover in quasi-contract for services rendered/contributed during the putative marriage

82. The term "injured party" is *purely* contract language which when interjected into the family law setting has no meaning since the basic policy expressed throughout the Family Law Act is the principle of no-guilt between the parties. Also, *see* note 18, *supra*.

83. 5 A. CORBIN, CORBIN ON CONTRACTS, § 1102 at 548 (1963).

84. The term "wrongful" is used in the same sense as "injured party." *See* notes 19 and 82, *supra*.

85. 5 A. CORBIN, CORBIN ON CONTRACTS, § 1109 at 582-3 (1963).

86. Under an express contract the terms and conditions would be self-explanatory; under an implied-in-fact contract, the court by looking at the action of the parties would take into consideration the contribution by one or both of the parties in the terms of the implied contract.

87. *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 200 P.2d 49 (1948).

because failure to do so would result in unjust enrichment upon the husband.⁸⁸

On the other hand, California had at the time of the *Lazarevich* decision, by an overwhelming weight of authority, denied a putative spouse the right to recover alimony or spousal support.⁸⁹

With the enactment of Civil Code Section 4455⁹⁰ the putative spouse is entitled, in addition to an equal distribution of the property, to support if the court deems it just and appropriate. Thus, the need for quantum meruit as an equitable remedy has been seen by many authors to be effectively precluded with respect to putative marriage.⁹¹

However, since the Court in *Marvin* does not focus upon the distinction of "meretricious-putative"⁹², quantum meruit could be seen as a substitute for support after dissolution as an addition to the division of the property.

Once again we must return to our basic social policy argument—whether a narrow approach will be taken in the interpretation of the family relationship context or whether a broad view will be taken. If the narrow approach is taken, the utilization of the theory of quantum meruit could very well be looked upon as a separate remedy for support after distribution of the particular property is accomplished.

On the other hand, if a broad view is taken, quantum meruit would, in the construction of implied-in-fact contracts, be a part of the total scope of equitable relief in the establishment of equality of division of property between the parties involved.

With respect to an express contract that the parties have made, quantum meruit could be awarded for support to either party in the form of compensation for services to the communi-

88. *Id.* at 715, 200 P.2d at 53.

89. *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 69 P.2d 845, (1937); *Millar v. Millar*, 175 Cal. 797, 167 P. 394 (1917); *Middlecoff v. Middlecoff*, 171 Cal. App. 2d 286, 340 P.2d 331 (1959). "Alimony" was the word commonly used prior to the enactment of the Family Law Act. 1700 CAL. STATS. § 7 (1951 repealed 1969.) The word "support" is now generally used to refer to support of both spouse and children. CAL. CIV. CODE §§ 4351, 4357, 4801 (West Supp. 1977).

90. CAL. CIV. CODE § 4455 (West Supp. 1977).

91. *Luther and Luther, Support and Property Rights of the Putative Spouse*, 24 HASTINGS L. REV. 311, 325 (1973). The authors relying upon the Report of the Governor's Commission on the Family, the legislative intent behind the Family Law Act, and basic equitable considerations came to the conclusion that Section 4455 was intended to supercede the quantum meruit remedy formerly available to a putative spouse.

92. See note 5, *supra*.

ty interest, thereby insuring a parity between a marital and non-marital relationship and a uniform equitable division.

A second construction of the use of quantum meruit recovery could be seen as a "piggy-back" remedy to accompany relief obtained as a result of distribution under the theories of express or implied contract.⁹³

The wording that the Court employs does not really give a clear indication as to the purported scope of the remedy. The Court does point out that the domestic services of a cook, housekeeper, and homemakers have value.⁹⁴ The issue of compensation⁹⁵ for domestic services⁹⁶ rendered during a non-marital relationship was first addressed in *Vallera v. Vallera*.⁹⁷ There the majority of the court decided that service could not be included in the term "funds" with respect to contribution to the acquisition of property.⁹⁸ Mr. Justice Curtis in his dissent⁹⁹ in *Vallera* criticized the majority for disallowing the rendition of domestic

93. *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 100, 69 P.2d 845, 848 (1937). Under a quasi-contract theory it was held that, where no "marital" property has been jointly accumulated, a bona fide putative spouse may recover the reasonable value of her services over and above the value of the support and maintenance furnished by the other party.

Since it could be construed that under an implied agreement the terms of the property division and the terms of support and maintenance would be covered, the remedy in quantum meruit would be a "bonus" peculiar to the non-marital relationship.

If used alone in the instance where no property has accumulated during the marriage, the non-marital spouse has an advantage over the validly married spouse; if there is property accumulated during the relationship, the implied contract would govern distribution and support and maintenance. The rationale behind quantum meruit recovery would remain the same—being reimbursed for services rendered to another and a logical and persuasive argument could be made in support thereof.

94. *Marvin v. Marvin*, 18 Cal. 3d 660, 677, 557 P.2d 106, 117, 134 Cal. Rptr. 815, 826 (1977). Moreover, the value of a spouse's domestic services rendered can be readily ascertained by pricing the amount of money that one would need to hire a worker to perform such services over the specified time period.

95. In an express contract if a "services rendered" clause was not included, the court could reasonably "fill in" the term and give effect to the contract. With respect to implied contracts, the term of services rendered could easily be interpreted by a Court to be a term within the contemplation of the parties.

96. The term "domestic services" refers to those services that are essential to the maintenance and preservation of a household. Included are services of a cook, homemaker, housekeeper, etc.

97. 21 Cal. 2d 681, 134 P.2d 761 (1943).

98. *Id.* at 685, 134 P.2d at 763.

99. *Id.*

services to be included in the concept "contribution of funds" that would entitle the non-working spouse to share equally in the division of the property, because she contributed to its acquisition. In his dissent in *Keene v. Keene*¹⁰⁰, Mr. Justice Peters finds contribution of domestic services as meeting the requirement of contribution of funds that assist in the acquisition of property. He states the major issue as whether the term "funds" as used in *Vallera* was intended to include extramarital services as well as money and negotiable paper. The majority in *Keene* did not equate the two, stating that the "common everyday meaning includes cash and negotiable paper and property of value which may be converted into cash, thus excluding services."¹⁰¹ However, as Mr. Justice Peters points out the two cases cited by Mr. Chief Justice Traynor in *Vallera* make it clear that as used in that quotation the term was to include services as well as money or tangible property.¹⁰²

However, just as the argument was proposed that services are included in the words "funds" in the sense of contribution to property, so can an argument be made extending the point that if domestic services have a value and that such domestic services are conferring a benefit upon the other party, then relief by way of quantum meruit can be sustained independent of relief granted with respect to the division of property if the express or implied contract can be based upon independent consideration.

Therefore, it is conceivable that one party could recover a settlement for an equal division of the property under the theory of express or implied-in-fact contract and at the same time receive compensation for services rendered over and beyond the allocation to be made for support. This situation could become a reality for the simple reason that the non-marital parties are supposedly contracting as individuals. Consideration for the implied or express agreement could be severed from the consideration for compensation for services rendered. For example, in the case at hand, the possibility that the plaintiff's contract would have been upheld based upon her giving up a career as a singer, would be legal detriment enough to support a foundation of consideration.¹⁰³ So too, the working

100. 57 Cal. 2d 657, 672, 371 P.2d 329, 338, 21 Cal. Rptr. 593, 602 (1962).

101. *Id.* at 663, 371 P.2d at 332, 21 Cal. Rptr. at 596.

102. *Hayworth v. Williams*, 102 Tex. 308, 116 S.W. 43 (1901). The "funds" contributed were services alone; and *Delamour v. Roger*, 7 La. Ann. 152, here the term "funds" was used in reference to a situation where services and money were both contributed.

103. See note 79, *supra*.

non-marital partner who contributes his¹⁰⁴ earnings to the relationship, thus recovering an equal division of the property, could then establish the claim of quantum meruit for domestic services rendered to the other spouse, contending that the other spouse was unjustly enriched by his domestic services. The claim would be based upon the fact that if he did not perform those services money would have had to have been expended to acquire such services in the marketplace.

But query whether the parties ever intended such a remedy or, moreover, whether in the absence of the situation where acquisition of property is concerned, one party or the other has been unjustly enriched. Domestic services contributed to the relationship would logically tend to benefit the relationship as a whole, not one party in particular.

To make matters more complex, the other spouse not alleging recovery in quantum meruit could counter with the argument that both parties contributed domestic services, therefore he would pray to the court for similar recovery.

If such a case would be sustained, then the implications regarding a statutorily valid marriage would be effected. The marital dissolution procedure under the Family Law Act does not provide for such relief in quantum meruit. Thus, the ruling favoring a quantum meruit recovery for services rendered would work in favor of the non-marital relationship. Consequently, based upon the fundamental policy of granting equitable relief, such a result would be inequitable in that, in essence, the legal spouse faced with dissolution would be at a legal disadvantage if the same result for recovery were not granted.¹⁰⁵

104. The masculine pronoun is used throughout this paper not in a connotation of the male-female roles, but is used in a sexless connotation.

105. The situation in a dissolution of marriage would be that the Court would divide the property according to CAL. CIV. CODE § 4800 (West Supp. 1977) and support and maintenance would be awarded under CAL. CIV. CODE § 4801 (West Supp. 1977). Moreover, the spouse who performed domestic services throughout the relationship most probably would be denied recovery on the theory that the marital contract did not contemplate such a recovery and that the legislature having spoken with respect to the dissolution of valid marital relationships, the Courts are thus precluded from granting such a remedy.

IV
ALTERNATIVE TO MARVIN - REDEFINITION OF
EQUITABLE SCOPE WITH RESPECT TO
NON-MARITAL RELATIONSHIPS

In assessing the present and potential problems of the *Marvin* decision, one questions whether or not a more desirable solution could be fostered and achieved. Indeed, the principles of the *Marvin* decision did more to disrupt the current law than to establish predictable guidelines by which parties could ascertain their rights and obligations.

In an attempt by the Court to "cleanse" the Family Law Act of such relationships, the Court has taken non-marital relationships out of the family law context and has relocated them into the world of contract law as if they were devoid of any "family setting".

Moreover, the Court, in an area that is grounded upon social policy considerations, refuses to define the social policy that has influenced its decision.

A more equitable basis for the division of property would be to utilize statutory language provided under the Family Law Act¹⁰⁶ with regard to quasi-marital property. Such Court treatment would serve as a guide to the legislature for revision of the Civil Code to include non-marital relationships within the scope of the family setting.

Taking as a given fact, as does the *Marvin* Court, that during the past fifteen years there has been a substantial increase in the number of couples living together without marrying¹⁰⁷, the social policy of the State must adapt itself to the changing trend.

Rather than looking at non-solemnized marriages as a significant factor in the destruction of the recognized public policy to foster and promote the institution of marriage, one should look upon its recognition as tending to promote the concept of the family and strengthen the institution of marriage. The State by imposing the same rights and duties upon those living together with regard to property division as those lawfully married, would put an end to the advantageous position of the working spouse in a non-marital relationship. For the parties to call upon

106. CAL. CIV. CODE §§ 4000-5000 (West 1976).

107. "The 1970 census figures indicate that today perhaps eight times as many couples are living together without being married as cohabitated ten years ago." See, Comment, *In Re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226 (1974).

the law for relief, they must submit to society's necessary imputation of rights and duties.

A balancing of the interests must take place: the State's interest as prescribed in the state's police power in promoting family relationships and regulating the law with respect to such relationships weighed against the freedom of the individual to adopt a lifestyle outside of the purview of the established community property framework. Under the general welfare provision, the state must put the interest of the whole above that of individual preference to conduct one's affairs outside that of the accepted social guidelines.

One of the Family Law Act's principle policy guidelines is the elimination of the concept of fault or guilt from consideration in interpretation of the Act¹⁰⁸. The *Marvin* Court adopted this philosophy and extended its application to persons who choose to live outside the marital structure stating that they will not be referred to as "sinful or guilty," but will be treated as individuals entitled to the equitable protections of the courts. Thus, leaving the parties in the position where they stood prior to entering into the relationship proves inequitable. As the *Marvin* Court perceptively states "perpetuation of judicial rules which result in an inequitable distribution accumulated during a non-marital relationship is neither a just or an effective way of carrying out that policy."

The *Marvin* Court's flaw is that it did not define its scope when it proposed the remedies at the outset of its opinion. By eliminating the Family Law Act from consideration in dealing with non-marital relationships, the Court detached itself from the Family Law setting and its equitable considerations from which to analogize.

Also, the *Marvin* Court did not define a social policy to base its decision upon. Clearly, the Court intimated that the *Beckman* approach with respect to the social policy of fostering and promoting the solemnized institution of marriage was not an equitable way to deal with the issue of non-marital relationships. Thus, the Court should have stated a new policy of the State in fostering family relationships, one not constrained with

108. See note 19, *supra*.

labels, but one to which the State imposes rights and duties consistent with the rights and duties accorded solemnized marriages under the Family Law Act.

Since the Court accepted the *Cary* premise that the Family Law Act did away with the concept of "guilt" in a non-marital relationship, nothing less than both equality in treatment and in a spouse's rights to share in the community after dissolution would seem equitable. Thereby, the Family Law Act, combined with a recognition of the new social policy espoused above, creates the scope in which the Court could function in a consistent and predictable manner.

Therefore, the course of action the Court should adopt is as follows:

- 1—Adopt as a threshold test to determine whether the Court's equitable jurisdiction comes into play with regard to non-marital relationships - the "Community of Interest"¹⁰⁹ standard.
This would alleviate all the discussion and subjective determination of the rights of the parties upon the dissolution of the relationship;
- 2—After the threshold test is met, establish a rebuttable presumption¹¹⁰ that the man and woman assumed the rights and duties of a legal spouse with regard to property acquired during the relationship;
- 3—Apply equitable principles, utilizing the scope of Family Law Act in the division of property.
In this context the wording of Civil Code Section 4452 of quasi-marital property could be used in reference to such a distribution under community property principles.

In summary, the Court by instituting a procedure in equity, the scope of which is enunciated by the Family Law Act with regard to property division, will accomplish the following:

- 1—unclog the Court's calendar with potential claims arising out of supposed contract action;
- 2—provide an efficient and predictable solution to the problem of property division with respect to non-marital partners;

109. The *Community of Interest Standard* is nothing more than a negative definition recognizing a non-marital living arrangement. A Court would find a *Community of Interest* existing in a relationship absent an overt, ostensible intent to keep the property acquired during the non-marital relationship separate and/or a conscious effort not to contribute services or funds to the community.

110. The presumption referred to is conceived to be a presumption of law. 9 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2491 at 288, (3rd ed. 1940). A rebuttable presumption is defined as a rule of law laid down by the judge, which attaches to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent.

It would be envisioned that if no sufficient evidence to the contrary [evidence that an actual family relationship did *not* exist] was introduced, the Court would proceed to the third step of the proposal, the guide to division.

- 3—provide an equitable system which will encourage family relationships, now that each spouse is aware that his duties and obligations are identical to that of a married person; and
- 4—provide the legislature with guidance to revise the statutory treatment of non-marital partners.

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